LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JUL 15
JOHN T. FEY, Clerk

No. 129

In the Supreme Court of the United States

OCTOBER TERM, 1957

PAUL DAYTON, PETITIONER

v.

WHITNEY GILLILLAND, PEARL CARTER PACE AND HENRY J. CLAY, CONSTITUTING THE FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, AND GEORGE M. HUMPHREY, AS THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
B. JENKINS MIDDLETON,
Attorneys,
Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute, Executive Agreement and rule involved	2
Statement	3
Argument	13
Conclusion	20

CITATIONS

Cases:

American & European Agencies, Inc. v. *Gillilland*, C. A. D. C. No. 13447, decided June 27, 1957 — 16

Brownsville v. *Loague*, 129 U. S. 493 — 20

Comegys v. *Vasse*, 1 Pet. 193 — 17

de Veyver v. *Gillilland*, 228 F. 2d 640, certiorari denied, 350 U. S. 994 — 11, 12, 13, 15, 19

Frank Adam Electric Co. v. *Westinghouse Elec. Mfg. Co.*, 146 F. 2d 165 — 17

Haas v. *Humphrey*, C. A. D. C. No. 13728, decided May 16, 1957 — 16

International Trading Corp. v. *Edison*, 109 F. 2d 825 — 20

Laycock v. *Hidalgo County Water C. & I. Dist.* No. 12, 142 F. 2d 789, certiorari denied, 323 U. S. 731 — 20

Ledbetter v. *Farmers Bank & Trust Co.*, 142 F. 2d 147, certiorari denied, 323 U. S. 719 — 15

Meade v. *United States*, 76 U. S. 691 — 17

National Park Bank, Ex parte, 256 U. S. 131 — 20

Suckow Borax Mines Consol. v. *Borax Consolidated*, 185 F. 2d 196, certiorari denied, 340 U. S. 943 — 15

Williams v. *Heard*, 140 U. S. 529 — 17

Z. & F. Assets Corp. v. *Hull*, 311 U. S. 470 — 15, 17, 20

Constitution, Statutes, and Executive Agreement:

Constitution of the United States, Fifth Amendment — 12

Act of August 8, 1953, 67 Stat. 506, Section 6 — 7

International Claims Settlement Act of 1949 (64 Stat. 12 *et seq.*, 22 U. S. C. 1621–27):

Section 3 (c) — 7

Constitution, Statutes, and Executive Agreement—Con.
International Claims Settlement Act—Continued
Page
Section 4 (a) 5, 6
Section 4 (b) 6
Section 4 (h) 6, 12, 16
Section 5 6
Section 6 (as amended, 22 U. S. C., Supp. II, 1625) 7
Section 7 (a) 6
Section 7 (e) 6
Section 7 (f) 7
Yugoslav Claims Agreement of 1948 (62 Stat. 2658, *et seq.*):
Preamble 4
Article 1 (a) 4
Article 1 (c) 4, 5
Article 2 (A) 4
Article 3 4
Article 8 4, 5, 16
Article 9 5
Article 9 (b) 4
Miscellaneous:
1 Barron and Holtzoff, *Federal Practice and Procedure* (Rules Ed.), 887 17
95 Cong. Rec. 8838–8839 3
19 F. R. 3985 5
Federal Rules of Civil Procedure, Rule 15 (a) 2, 14, 15
Hearings on Foreign Claims Settlement Commission, House Committee on Foreign Affairs, 84th Cong., 1st Sess.:
p. 98 7
p. 111 8
H. Rep. 770, 81st Cong., 1st Sess.:
p. 3 3, 4
p. 6 20
H. Rep. 1021, 83d Cong., 1st Sess., p. 2 20
3 Moore's *Federal Practice* (2d ed.) 833 15
S. Rep. 800, 81st Cong., 1st Sess.
p. 3 3
p. 5 20
S. Rep. 686, 83d Cong., 1st Sess., p. 3 20

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 129

PAUL DAYTON, PETITIONER

v.

WHITNEY GILLILLAND, PEARL CARTER PACE AND HENRY J. CLAY, CONSTITUTING THE FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, AND GEORGE M. HUMPHREY, AS THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

No opinion was filed by the District Court. The opinion of the Court of Appeals (R. 64–65) is reported at 242 F. 2d 227 and is set out as the appendix to the petition.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1957 (R. 66). The petition for a writ of certiorari was filed on May 14, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the courts below properly ruled that they had no jurisdiction over the subject matter of petitioner's amended complaint, based upon a final decision of the Foreign Claims Settlement Commission denying petitioner's claim under the Yugoslav Claims Agreement of 1948 and the International Claims Settlement Act of 1949.

2. Whether the court below properly ruled that the District Court did not abuse its discretion in denying petitioner's motion for leave to amend his amended complaint in order to allege a "property right" in the Yugoslav Claims Fund and an unconstitutional deprivation of that right by the Commission.

STATUTE, EXECUTIVE AGREEMENT AND RULE INVOLVED

The Yugoslav Claims Agreement of 1948 (62 Stat. 2658, *et seq.*) is set forth in Appendix C of the Joint Appendix[1] (44a–51a). The International Claims Settlement Act of 1949 (64 Stat. 12, *et seq.*, 22 U. S. C. 1621–27) is set forth in Appendix B of the Joint Appendix[2] (31a–43a). Rule 15 (a) of the Federal Rules of Civil Procedure provides in pertinent part as follows:

> *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served, or, if the

[1] References to the Joint Appendix printed for the use of the court below will be designated merely by page citations (*e. g.*, "44a–51a"). References to the petition will be designated by "Pet. ——".

[2] See fn. 6, *infra*, p. 7.

> pleading is one to which no responsive pleading is permitted and the action has been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. * * *

STATEMENT

1. The Yugoslav Claims Fund was created by the Yugoslav Claims Agreement of 1948 (44a–51a). From time to time prior to the signing of that Agreement, various claims arose against Yugoslavia on behalf of American nationals, primarily out of actions by the postwar government in Yugoslavia with regard to the taking of property. S. Rep. 800, 81st Cong., 1st Sess., p. 3. Diplomatic action was taken to keep such claims for compensation alive, with the hope that settlement negotiations could be instituted on a broad basis, thus avoiding the unsatisfactory remedy offered by recourse to local tribunals. S. Rep., *supra*, p. 3. The opportunity to push such negotiations to a successful conclusion was offered when the condition of the Yugoslav economy made negotiations with this country necessary. 95 Cong. Rec. 8838–8839.

In May 1947, the Department of State entered into negotiations with the Yugoslav Government looking to a general economic settlement of outstanding financial questions between the two governments.[3] Two interdependent executive agreements were signed on July

[3] H. Rep. 770, 81st Cong., 1st Sess., p. 3.

19, 1948.[4] One of these, here involved, was the Yugoslav Claims Agreement of 1948. This Agreement, aimed at "effecting an expeditious and equitable settlement of claims" (Preamble), provided for the payment by Yugoslavia to the United States Government of $17,000,000 in full settlement and discharge of certain claims of the United States Government against Yugoslavia and of all claims "of nationals of the United States against the Government of Yugoslavia on account of the nationalization and other taking by Yugoslavia of property" occurring between September 1, 1939, and the date of the Agreement (Article 1 (a)). The Agreement specifically provided that the "claims of nationals of the United States to which reference is made in Article 1 of this Agreement do not include claims of individual nationals of the United States who did not possess such nationality at the time of the nationalization or other taking, which claims shall be subject to compensation by the Government of Yugoslavia, either by direct negotiations between that Government and the respective claimants or under compensation procedures prescribed by Yugoslav law" (Article 3; see also Article 2 (A)).

Claims arising under the Agreement were to be adjudicated by an agency to be established or designated by the United States Government, and the Fund was to be distributed "in accordance with such methods of distribution as may be adopted by the Government of the United States" (Articles 1 (c), 8 and 9 (b)). Provision was made for the furnishing of informa-

[4] *Ibid.*

tion, "to support or refute * * *" any claim for participation" in the Fund, by Yugoslavia to the agency established by the United States for the adjudication of claims within the Agreement and for participation by Yugoslavia in the proceedings before the adjudicating agency (Article 9). All determinations of the adjudicating agency with respect to the validity or amounts of individual claims were to be "final and binding" (Article 8). The balance, if any, of the $17,000,000 Fund remaining after such adjudication and distribution was to be returned to the Government of Yugoslavia (Article 1 (e)).

In order to provide the meghanism to process claims under this Agreement and to establish the method of distribution of the Fund, and additionally to set up an expert body for the processing of claims under any similar agreements which might be reached in the future with other governments, Congress passed the International Claims Settlement Act of 1949 (31a–43a). This Act established the International Claims Commission within the Department of State and gave it "jurisdiction to receive, examine, adjudicate, and render final decisions with respect to claims" under the Yugoslav Claims Agreement of 1948 or any similar future agreement[5] (Section 4 (a), 22 U. S. C. 1623 (a)). In reaching its decisions, the Commission was to "apply the following in the following order: (1) The provisions of the applicable claims agreement as

[5] The functions and jurisdiction of the International Claims Commission were transferred to the Foreign Claims Settlement Commission by Reorganization Plan No. 1 of 1954, effective July 1, 1954 (19 F. R. 3985).

provided in this subsection; and (2) the applicable principles of international law, justice, and equity" (Section 4 (a), 22 U. S. C. 1623 (a)). Decisions of the Commission were to be "upon such evidence and written legal contentions as may be presented * * *, and upon the results of any independent investigation of cases which the Commission may deem it advisable to make" (Section 4 (b), 22 U. S. C. 1623 (b)). Provision was made for notice and hearing, and decisions of the Commission were to "constitute a full and final disposition of the case in which the decision is rendered" (Section 4 (b), 22 U. S. C. 1623 (b)). The Act further provided that the "action of the Commission in allowing or denying any claim under this Act shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise" (Section 4 (h), 22 U. S. C. 1623 (h)).

Section 5 (22 U. S. C. 1624) directed the Commission to certify, "as soon as possible, and in the order of the making of such awards", copies of the awards to the Secretary of the Treasury and to the Secretary of State. Under Section 7 (a) (22 U. S. C. 1626 (a)), the Secretary of the Treasury was "authorized and directed to pay" the awards certified, in accordance with the procedure set forth in that section. Any person who made application for any such payment was to be held to have consented to all the provisions of the Act (Section 7 (e), 22 U. S. C. 1626 (e)). The Commission was required to file a report with Con-

gress every six months concerning its operations under the Act (Section 3 (c), 22 U. S. C. 1622 (c)). Section 6, as amended (22 U. S. C., Supp. II, 1625), directed the Commission to complete its affairs with respect to Yugoslav claims not later than December 31, 1954.[6]

Section 7 (f) of the Act (22 U. S. C. 1626 (f)) provided that "[n]othing in this Act shall be construed as the assumption of any liability by the United States for the payment or satisfaction, in whole or in part, of any claim on behalf of any national of the United States against any foreign government".

2. The Commission began its consideration of claims filed pursuant to the Agreement shortly after the passage of the Act and concluded its affairs with respect to Yugoslav claims on December 31, 1954, the termination date set by Section 6 of the Act as amended. During the five-year period of adjudication, the Commission considered 1,554 claims totaling almost $150,000,000, denied 678 claims, and certified to the Secretary of the Treasury 876 awards aggregating almost $19,000,000, plus interest.[7] The $17,000,000 Fund is therefore insufficient to satisfy in full

[6] The Joint Appendix sets forth the unamended provisions of Section 6 (38a). It should instead set forth the following, as amended by the Act of August 8, 1953, 67 Stat. 506:

> The Commission shall complete its affairs in connection with settlement of United States-Yugoslav claims arising under the Yugoslav Claims Agreement of 1948 not later than December 31, 1954: *Provided*, That nothing in this provision shall be construed to limit the life of the Commission, or its authority to act on future agreements which may be effected under the provisions of this legislation.

[7] *Hearings on Foreign Claims Settlement Commission*, House Committee on Foreign Affairs, 84th Cong., 1st Sess., p. 98.

the 646 awards exceeding $1,000 in principal amount. Accordingly, no interest is payable on awards, and the adjudication affords only partial compensation to duly certified awardholders, whose property was nationalized or otherwise taken by Yugoslavia approximately ten years ago.

3. Petitioner, not an awardholder but one of the 678 claimants whose claims before the Commission were denied, instituted the instant action against the members of the Foreign Claims Settlement Commission and the Secretary of the Treasury in their official capacities. The amended complaint alleged (1a–8a):

On June 28, 1951, petitioner, a naturalized American citizen, filed his claim with the Commission requesting compensation in the amount of $1,504,624.78 for the nationalization or other taking by the Government of Yugoslavia of property indirectly owned by him (2a–3a). The Commission issued a Proposed Decision on October 15, 1954, denying petitioner's claim on the ground that the properties involved had been taken over by Yugoslavia prior to the date of petitioner's acquisition of American citizenship.[8] The Decision, stating that the properties had been "taken" by Yugoslavia prior to nationalization, acknowledged that such takings might have "been accomplished with-

[8] 194 other claims, totaling, with that of petitioner, $40,271,718.11, were likewise rejected because the claimants were not proven to be American citizens at the time of the nationalization or other taking of the property. *Hearings*, *supra*, p. 111, note.

out legal proceedings" or statutory basis.[9] The Commission found that official Yugoslav records indicated that a judgment had been entered against petitioner *in absentia* by a Yugoslav military court in 1945 under the Yugoslav Enemy Property Law. Petitioner complained of the Commission's failure to produce a copy of this judgment and of its reliance upon secondary sources of information[10] (3a), alleging that the judgment was in fact a nullity under Yugoslav law on jurisdictional and other grounds, and that accordingly, under principles of international law the judgment could be given no effect (4a).

---

[9] The Proposed Decision added (56a–57a):

> * * * the Commission must find that the validity or propriety of these proceedings does not control the determination of these claims. Where property has actually been taken by the Government of Yugoslavia under claim of ownership, it would constitute a "taking" within the meaning of the Yugoslav Claims Agreement, even if this had been accomplished without legal proceedings of any kind or even without a statutory basis for it in Yugoslaw law. The Yugoslav Claims Agreement expressly contemplated that claims thereunder would be compensated if the property involved had been taken by any means other than nationalization or other legal process assuming, of course, that other conditions precedent, such as nationality have been met.
>
> * * * * *
>
> Such impropriety as may have existed in the procedures by which any such taking was effected or in any judgment of state ownership entered may well be a matter for direct negotiations between the claimant and the Government of Yugoslavia, but it is not a matter for consideration or determination by this Commission.

[10] In his petition, however, petitioner concedes that neither he nor the Yugoslav Government had furnished the Commission with a copy of the judgment, and that therefore it had none to produce (Pet. 5–6).

A hearing was granted before a hearing examiner on petitioner's objections to the Proposed Decision (4a–5a). Although recognizing that its decision was based upon records furnished by the Yugoslav Government which might have been tampered with and might be false and that the alleged takings prior to nationalization might have been illegal,[11] the Commission rendered a Final Decision on December 30, 1954, affirming the Proposed Decision (5a).

After setting forth the foregoing allegations, petitioner, while acknowledging that the Act prohibits judicial review of the decision of the Commission and that therefore he had "no adequate remedy either at common law or under the statutes" (7a), invoked "the aid of the equity process of" the District Court, praying for the following relief (8a):

> (1) a judgment declaring the Final Decision "to be contrary to the facts and to the law and null and void";
>
> (2) a mandatory injunction requiring that the Commission declare the final decision to be ineffective;
>
> (3) a mandatory injunction requiring the Commission "to decide such claim in accordance with the facts and the provisions of the Act as intended by the Congress, and to certify an

[11] The amended complaint noted that the hearing examiner "acknowledged the possibility 'that some of the documents here * * * may have been tampered with and the Commission may not have received true copies'" (5a). The full context of his remarks, set forth at pp. 10a–11a, includes the statement that "with respect to official documents, especially court decisions", the Commission was "limited to what the Yugoslav Government will give us."

award made in accordance with such decision to the Secretary of the Treasury * * *"; and

(4) an injunction restraining the Secretary of the Treasury until final disposition of his claim from "making payments out of the Yugoslav Claims Fund which would reduce the total amount in such Fund to a sum less than $1,504,624.78, in addition to such other sums as may heretofore have been set aside pending the adjudication of other claims for judicial relief."

The case was held in abeyance pending the decision of the Court of Appeals in *deVegvar* v. *Gilliland*, 228 F. 2d 640 (C. A. D. C.), certiorari denied, 350 U. S. 994. After the Court of Appeals on December 22, 1955, ruled in that case that Section 4 (h) of the International Claims Settlement Act of 1949 precludes judicial review of Commission determinations on Yugoslav claims (228 F. 2d 640), and after this Court denied certiorari to review that ruling (350 U. S. 994), respondents moved to dismiss the amended complaint for lack of jurisdiction over the subject matter (13a).[12] A hearing on this motion was held on

[12] The Proposed Amendment to the Amended Complaint would have added the following allegations calculated to circumvent the holding in the *deVegvar* case: that the Yugoslav Claims Agreement "created the Yugoslav Claims Fund for the benefit of all United States nationals who had claims against Yugoslavia for the loss of property provided for in the agreement"; that the $17,000,000 figure for the Fund was based upon acknowledged outstanding claims against Yugoslavia by United States nationals; that the balance of the Fund was to be returned to Yugoslavia; that the taking of appellant's property was included within the terms of the Agreement; and that appellant accordingly "has a property right in the Yugoslav Claims Fund" (14a–15a). Further: that the action of the Commission in relying on the certificate "deprived plaintiff of

May 2, 1956. After argument on the motion, the District Court granted the motion to dismiss (29a). Counsel for petitioner then moved for leave to amend the amended complaint (29a). After receiving a copy of the proposed amendment, the court denied leave to amend (30a).

On May 4, 1956, the court entered its order dismissing the amended complaint, denying petitioner's motion for a preliminary injunction, and denying his motion for leave to file an amended complaint (24a). Petitioner thereupon moved the Court of Appeals to enjoin the Secretary of the Treasury from disbursing the Fund. This motion was denied, as was a subsequent motion to reconsider the denial, thus leaving the Secretary free at any time to pay out the balance of the Fund and render petitioner's case moot.

On February 14, 1957, the Court of Appeals affirmed the order of the District Court in a per curiam opinion (Pet. 1a–2a). Noting that the essential allegations of the complaint were similar to those in the *deVegvar* case, the court ruled that the dismissal for lack of jurisdiction over the subject matter, on the authority of *deVegvar,* was "clearly correct". The court further ruled that the denial of leave to amend the complaint was proper, since "the proposed amendment would not supply the deficiencies of the original

---

his property right in the Yugoslav Claims Fund without due process of law in violation of the Fifth Amendment to the United States Constitution" (18a); that the Commission's action was contrary to its ruling in an analogous case and therefore arbitrary and capricious and in violation of the Fifth Amendment; and that Section 4 (h) of the Act, prohibiting judicial review, is unconstitutional (20a–21a).

complaint or give the court jurisdiction", nor would the "conclusory statments * * * suffice to change the result called for by *deVegvar*". Adding that petitioner could claim solely by virtue of his interest in the Fund created by the Act and that under its terms he was not entitled to complain, the court concluded by stating that there had clearly been no taking of petitioner's property by the United States (Pet. 2a).

ARGUMENT

The decision of the court below sustains the action of the District Court in two respects: first, in dismissing petitioner's amended complaint for lack of jurisdiction over the subject matter; and second, in denying leave to further amend the amended complaint. These rulings are in complete conformity with the sweeping finality and non-reviewability provisions of the International Claims Settlement Act of 1949; with the earlier ruling of the court below in the *deVegvar* case, in which this Court denied certiorari; with the law governing international claims funds; and with the rules governing the exercise of the trial court's discretion in passing upon motions for leave to file further amendments to amended complaints. The decision is clearly correct and does not warrant review by this Court.

1. The first reason stated by petitioner for the granting of the writ is, in essence, that his case is distingurishable from the *deVegvar* case (Point I, Pet. 7–11). He urges this Court to pass upon a question purportedly not raised or decided in *deVegvar*: whether the Yugoslav Claims Agreement vested

"property rights" in the Yugoslav Claims Fund in petitioner and in all other claimants against the Fund.[13]

This question, however, and the question of the constitutionality of Section 4 (h) which flows from it, were similarly not raised in the original complaint in this case, nor were they raised in the amended complaint (1a–8a) filed by petitioner as a matter of course under Rule 15 (a) of the Federal Rules of Civil Procedure (*supra*, pp. 2–3). The question was not raised until, at the hearing on respondents' motion to dismiss the amended complaint, petitioner sought leave to file a second amended complaint in the hope that by the addition of the conclusory statements now relied on he might evade the language of the *deVegvar* decision. What petitioner actually seeks from this Court, therefore, is further review of the trial judge's exercise of discretion in denying leave to make further amendments.[14]

---

[13] Petitioner nowhere states exactly why, as a practical matter in his case or any other, he believes it important for this Court to "define the nature and character of the Yugoslav Claims Fund and the rights of claimants therein" (Pet. 11), or to decide whether claimants under this type of agreement "have property rights in the funds provided * * * or receive payments thereunder as a matter of grace" (Pet. 7–8). We assume, however, as will be seen below, that this section of the petition relates to the allegation contained in Paragraph 14 of the Proposed Amendment to the Amended Complaint that "Section 4 (h) of the Act which prohibits review is unconstitutional * * *" (21a).

[14] The petition implies throughout that the allegations of the proposed amendment to the amended complaint, leave to file which was denied, have the same force and effect as do matters alleged in the amended complaint which was before the District Court on motion to dismiss. As we show below, this is of course not the case.

It is well settled that under Rule 15 (a) the allowance of leave to amend an amended complaint is within the discretion of the District Court, and that a denial of leave to amend is not subject to reversal on appeal in the absence of a clear showing of abuse of discretion. *Suckow Borax Mines Consol.* v. *Borax Consolidated,* 185 F. 2d 196 (C. A. 9), certiorari denied, 340 U. S. 943; *Ledbetter* v. *Farmers Bank & Trust Co.,* 142 F. 2d 147 (C. A. 4), certiorari denied, 323 U. S. 719;[15] 3 Moore's *Federal Practice* (2d ed.) 833. Here, the Court of Appeals has held not merely that the District Court did not abuse its discretion in denying leave to amend, but that "it acted properly in so doing * * *" (Pet. 2a).

The Court of Appeals based its ruling on the ground that denial of leave to amend is proper where, as here, "the proposed amendment would not supply the deficiencies of the original complaint or give the court jurisdiction", citing the *Ledbetter* case, *supra* (Pet. 2a). The court correctly pointed out that the allegations of the proposed amendment were conclusory in nature; that under this Court's decision in *Z. & F. Assets Corp.* v. *Hull,* 311 U. S. 470, 489, claimants against an international claims fund have no interests in the fund other than those created by statute, and that in the case of the Yugoslav Claims Fund the International Claims Settlement Act gave petitioner no right to complain; and, finally, that under its own decision in *deVegvar* v. *Gilliland, supra,* 228 F. 2d at

[15] Research has failed to reveal any case in which this Court has granted certiorari in order to review a district court's discretionary denial of leave to amend an amended complaint.

642, there had been no taking of plaintiff's property by the United States.[16]

The court might well have added that the Yugoslav Claims Agreement itself, upon which petitioner relies as establishing a property right and thus a right to judicial review, in fact compels conclusions opposite to those for which he contends. Article 8 specifically provides that the Fund is to be distributed among claimants "in accordance with such methods of distribution as may be adopted by the Government of the United States", and that "[a]ny determinations with respect to the validity or amounts of individual claims which may be made by the agency established or otherwise designated by the Government of the United States to adjudicate such claims shall be final and

[16] Since the date of its decision in this case, the court below has handed down two further decisions in cases seeking judicial review of actions of the Foreign Claims Settlement Commission in allowing or denying claims purportedly arising under the Yugoslav Claims Agreement. In both cases, the court held that Section 4 (h) precluded review. In *Haus* v. *Humphrey*, C. A. D. C. No. 13728, decided May 16, 1957, the plaintiff had alleged that the Department of State, in negotiating the Agreement, had specifically released her claim against Yugoslavia. In *American & European Agencies, Inc.* v. *Gilliland*, C. A. D. C. No. 13447, decided June 27, 1957, the court declined to review despite a claim that the plaintiff had been denied the hearing provided for in Section 4 (h) of the International Claims Settlement Act, 22 U. S. C. 1623 (h). The court ruled, *inter alia*, that "no claimant * * * has a right to participate in any amount until the Commission has made an award. In short, a benefit is being conferred * * *". (slip opinion, p. 5). These two cases represent the last of the attempts to secure judicial review of Commission action in connection with the Yugoslav Agreement.

binding"[17] (49a). Our interpretation of these provisions as precluding judicial review are supported by this Court's reasoning and decisions in such cases as *Comegys* v. *Vasse*, 1 Pet. 193; *Meade* v. *United States*, 76 U. S. 691, 700, 725; *Williams* v. *Heard*, 140 U. S. 529; and *Z. & F. Assets Corp.* v. *Hull*, *supra*—cases which petitioner has failed to give persuasive grounds for distinguishing.

Petitioner's lack of timeliness in filing his motion for leave to make additional amendments affords further ground for sustaining the action of the District Court. Although delay is not generally considered sufficient in and of itself to require denial of leave to amend, "the party seeking to amend should exercise due diligence and unless delay can be attributed to excusable oversight leave to amend may be denied". 1 Barron and Holtzoff, *Federal Practice and Procedure* (Rules Ed.), 887; see also *Frank Adam Electric Co.* v. *Westinghouse Elec. Mfg. Co.*, 146 F. 2d 165 (C. A. 8). In the present case, the proposed amendment was obviously designed to overcome deficiencies in the amended complaint revealed by the *deVegvar* decision. That decision stressed that "considerations of both domestic and foreign policy" required speed in the distribution of the Fund and, accordingly, a rapid

[17] To hold that actions of the Commission on claims arising under this Agreement are not barred from judicial review would raise the constitutional question of whether controversies arising from the Agreement present justiciable issues or are instead within the area of controversies "confided exclusively to the executive or political departments of government * * *". Justices Black and Douglas, concurring in *Z. & F. Assets Corp.* v. *Hull*, *supra*, 311 U. S. at 493.

termination of litigation. Yet petitioner did not seek leave to amend until over four months had elapsed after the *deVegvar* decision. In the circumstances of the case, petitioner's unexplained delay justified denial of the motion.

Other less apparent but equally valid grounds for refusing leave to amend on petitioner's "property rights" theory are available. For example, petitioner bases Point I of his petition on the claim that "the Yugoslav Claims Fund is a trust fund, and the United States is its trustee for the benefit of all claimants" (Pet. 10). If this were so, any suit by petitioner to enforce his rights as a beneficiary of that trust would necessarily be against the trustee—*i. e.*, against the United States, an indispensable party under petitioner's theory—and not against respondents. Such a suit would of course be an unconsented suit against the United States.

Moreover, petitioner begs the question by claiming status as a "beneficiary" by virtue of American citizenship at the time his property was taken. Petitioner submitted to the Commission for decision the question of whether or not he was in fact a citizen at the time his property was taken. Under the Agreement and the Act under which petitioner claims, the Commission is the sole body having jurisdiction to decide that question and it has already decided it adversely to petitioner.

Finally, the proposed amendment, far from alleging any real deprivation of due process, alleges no more than errors in legal and factual rulings.[18]

---

[18] See note 12, *supra*.

2. The second reason stated by petitioner for granting the writ is, in essence, that the decision of the court below in *deVegvar* v. *Gilliland, supra,* was in error (Point II, Pet. 11–18). The gist of this contention is that, regardless of whether or not the proposed amendment to the amended complaint should have been allowed, the amended complaint should not have been dismissed. Rather than attempt to distinguish his amended complaint from the complaint in *deVegvar,* petitioner merely reiterates the arguments that were made without success in the certiorari petition denied by this Court in that case (350 U. S. 994).

Petitioner is compelled to follow this course because the two complaints are virtually identical. Both object to the Commission's acceptance of and reliance upon certain evidence, to its interpretation and application of the principles of international law, and to its interpretation of the meaning of the phrase "nationalization or other taking" (5a–7a). The Commission's actions on all of these matters are clearly precluded from judicial review under the *deVegvar* decision. No purpose would be served by a reiteration here of the arguments advanced by the Government in that case. See Brief for the Respondents in Opposition, No. 654, 1955 Term.

3. As in *deVegvar,* the courts below found it necessary only to decide the threshold questions in this case. But other obstacles to any chances of petitioner's success in the instant case can be suggested. For one thing, it is doubtful whether the Secretary of the Treasury can properly be restrained from making payment on awards already certified. See *Z. & F.*

F. Assets Corp. v. *Hall*, 311 U. S. 470, 486, 489. In addition, in view of the congressional command to terminate Yugoslav affairs by a fixed date (*i. e.*, December 31, 1954), it is likewise doubtful whether the Commission has the power to act at this time with regard to the Yugoslav Agreement. See International Claims Settlement Act, Section 6, as amended, 22 U. S. C., Supp. II, 1625; S. Rep. 800, *supra*, p. 5; H. Rep. 770, *supra*, p. 6; H. Rep. 1021, 83d Cong., 1st Sess., p. 2; S. Rep. 686, 83d Cong., 1st Sess., p. 3; see *supra*, p. 7. And see *Brownsville* v. *Loague*, 129 U. S. 493, 501; *Ex parte National Park Bank*, 256 U. S. 131; *International Trading Corp.* v. *Edison*, 109 F. 2d 825 (C. A. D. C.); *Laycock* v. *Hidalgo County Water C. & I. Dist. No. 12*, 142 F. 2d 789 (C. A. 5), certiorari denied, 323 U. S. 731.

CONCLUSION

The decision of the court below is clearly correct and is not in conflict with any other decision. The questions presented, moreover, are not now of general importance. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
B. JENKINS MIDDLETON,
Attorneys.

JULY 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957